

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR
90 7th Street, Suite 3-700
San Francisco, California 94103
Telephone: (415) 625-7747
Facsimile: (415) 625-7772



August 8, 2017

The Honorable Christopher Larsen
Administrative Law Judge
Office of Administrative Law Judges
90 7th Street, Suite 4-800
San Francisco, CA 94103

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Office of Administrative Law Judges
San Francisco, CA

Re: *OFCCP v. Oracle, Inc.*, Case No. 2017-OFC-00006

Dear Judge Larsen:

Per this Court's July 20, 2017 Order, OFCCP respectfully submits this summary of discovery disputes in the above-referenced matter.

I. Overview of the Meet and Confer Process and Discovery to Date

Because the Court explicitly instructed the parties to work collaboratively to resolve discovery issues through negotiation and compromise, OFCCP does not lightly request judicial intervention. To avoid this, OFCCP engaged in exhaustive efforts to resolve the parties' disputes through an unprecedented and resource-draining meet and confer process involving over 50 hours of conferences with Oracle, the exchange of more than 40 letters, approximately 20 hours of interviews of Oracle's witnesses about its systems for storing and retrieving information¹, and scores more hours in preparation and letter writing.

This process, which consumed the past five months, yielded compromises on the majority of issues. OFCCP narrowed its requests, and Oracle agreed to produce entirely new databases (including much more comprehensive data about employees and applicants than provided during the compliance review) for the period from January 1, 2013 through the date the Court ultimately fixes pursuant to its Order to Show Cause. Oracle also agreed to produce other relevant documents, and to modify its procedure for searching for and producing emails. Two substantive issues persist. Oracle remains unwilling to provide: (1) employee contact information, and (2) analyses and documents it is required to prepare pursuant to OFCCP regulations.

¹ To challenge Oracle's position that despite being one of the largest suppliers of human resources databases, it could not produce highly relevant data about its employees and applicants (such as their education) and could not produce other data in electronic format, OFCCP served an early 30(b)(6) deposition notice, seeking information about Oracle's systems. The 30(b)(6) deposition never took place, since OFCCP agreed to accept Oracle's proposal to interview nine witnesses for two to three hours each, instead.

While the parties have now agreed on most of the documents to be produced (or a procedure for determining which documents will be produced), as of the date of this letter—more than 8 months since this case was filed, 7 months since OFCCP first sent its discovery requests, and 3 months since this Court ordered the parties to start producing documents—Oracle has:

- produced *no* new data;
- produced *no* privilege log;
- refused to commit to *any* deadline for producing documents it agreed to produce; and
- only produced approximately 23,000 pages of documents.²

This discovery is critical since, as with most employment cases, Oracle possesses virtually all of the information relevant to OFCCP's discrimination claims, including the data upon which OFCCP will base its statistical analysis.

By contrast, on May 9, OFCCP produced virtually all non-privileged documents in its case file, and has since agreed to produce all non-privileged, non-public, relevant documents in the Pacific Region. Despite OFCCP's acquiescence to producing documents that have limited relevance to claims that Oracle's recruitment, application, and compensation practices are discriminatory, Oracle continues to demand additional information: (1) privileged information and (2) contention discovery that is premature, particularly because OFCCP's contentions will be based almost entirely on the new data and other evidence Oracle has not yet produced.³

As for depositions, Oracle has not produced documents necessary to take the initial depositions OFCCP noticed, so the parties have postponed scheduling them. Oracle noticed a 30(b)(6) deposition, disputed below, primarily seeking information about privileged information and OFCCP's contentions at the time it filed the complaint. On August 3, Oracle noticed five additional depositions, which appear to seek similar information.

Oracle's delay in producing the first round of responsive discovery has already substantially prejudiced OFCCP's ability to develop and present its case under the current case schedule.

II. Case Management Proposals

A. Request for Regular Case Management Conferences

Following the Court's July 20, 2017 Order, the parties resolved a number of issues. However, OFCCP anticipates that additional issues will arise. As an example, after months of requesting

² Oracle contends that triple this number of documents has been produced, since the parties agreed that documents would be produced in three formats, and Oracle counts each page of a document as a separate document.

³ As with EEOC cases, OFCCP's investigation and conciliation efforts do not frame the issues during litigation. *See EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984) (investigative findings "do[] not adjudicate rights and liabilities; [they] merely place[] the defendant on notice of the charges against him. If the charge is not meritorious, procedures are available to secure relief, i.e. a de novo trial . . .") (internal citation omitted).

Oracle's search terms⁴ and Oracle questioning whether it had an obligation to identify them⁵, let alone permit any negotiation of search terms, yesterday, the parties agreed to a process that entails: (1) Oracle producing initial sample sets of documents for RFPs implicating large numbers of documents, (2) OFCCP reviewing those sample sets, (3) OFCCP developing and proposing search terms for the broader relevant period, and (4) the parties meeting and conferring over search terms, if Oracle disagrees with OFCCP's proposal. Completing this process will likely take at least six weeks from the date Oracle produces the sample sets. Furthermore, in discussing other RFPs, OFCCP may discover that search terms Oracle used without consulting OFCCP are flawed, and that additional documents should be produced.

To ensure that this process stays on track and that other issues are resolved as quickly as possible, OFCCP requests monthly case management conferences. Oracle does not object to this proposal and has suggested that more frequent conferences may be necessary.

B. Request for Production Schedule

OFCCP also requests deadlines be set for Oracle's production of documents. Oracle refuses to commit to producing documents responsive to OFCCP's February RFPs by a date certain, going so far to represent that it may produce documents through the end of fact discovery in an undefined rolling production that does not identify when production for each RFP is complete.

Particularly concerning is Oracle's failure to commit to producing data by a date that provides OFCCP and its expert(s) sufficient time to analyze the data, conduct follow-up discovery (including depositions), manually input missing information, and prepare a report. On June 30, after interviewing Oracle witnesses about its systems, OFCCP narrowed its data requests. While Oracle represents it is writing scripts to compile this data (using January 17, 2017 as a placeholder end date pending the Court's decision), it has not committed to a firm production date, stating only that it "hopes" to produce the data in one to two months.

OFCCP requests that the Court set the following deadlines for Oracle's document production:

- Produce the privilege log that it agreed to produce by June 12, 2017 within 3 days. (5/24/17 Ltr. from Riddell to Garcia ("We are working on [a privilege log] now, intend to produce it, and will do so no later than June 12"));
- Produce the databases no later than September 1, 2017;
- Produce all other documents responsive to the February RFPs by September 15, 2017,

⁴ OFCCP has reason to be concerned about Oracle's searches. During both the compliance review and discovery, Oracle represented that responsive documents did not exist when, in fact, they did. For example, Oracle stated that it would not produce documents responsive to requests about hiring "transfer employees" (defined to include individuals employed at Oracle's other locations or corporate affiliates), because it did not "hire" transfer employees. Only after OFCCP provided Oracle copies of its own documents describing a transfer employee as a "New Hire," did Oracle change its position.

⁵ "[W]hile key word searching is a recognized method to winnow relevant documents from large repositories, use of this technique must be a cooperative and informed process." *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007).

- excepting the emails subject to the sample and search term methodology; and,
- Produce all emails compiled through the sample and search term methodology by October 15, 2017.

As discussed below, even if these deadlines are ordered, the late production of these critical documents requires that the discovery deadline and expert disclosures be extended in this matter.

C. Request for Extension of Case Schedule

Because of the number of ongoing issues regarding discovery, and the fact that critical data and documents have not been produced, OFCCP proposes extending fact discovery by three months. Oracle does not object to OFCCP's proposed schedule, shown below.

Close of Fact Discovery	Friday, April 20, 2018
Initial Expert Disclosures	Friday, May 11, 2018
Rebuttal Expert Disclosures, if any	Friday, June 01, 2018
Close of Expert Discovery	Friday, June 29, 2018
Deadline to File All Pretrial, Discovery, and Dispositive Motions (non-MIL)	Friday, July 06, 2018
Deadline to Oppose Dispositive Motions, if any	Friday, July 20, 2018
Deadline to File Reply ISO Dispositive Motion	Friday, August 03, 2018
Deadline to Meet and Confer re Prehearing Statement and Pretrial Filings, Including MILs, Prehearing Statement, Exhibit List, and Witness List (Pre-Hearing Order § 4.d)	Friday, August 31, 2018
Pretrial Conference	Tuesday, September 18, 2018
TRIAL (14 days)	Monday, October 01, 2018
	Monday, October 15, 2018

This proposed schedule generally tracks the Court's framework for scheduling, with two exceptions. First, we afforded the parties a week more than what the Court's schedule provided to make their initial and rebuttal expert disclosures. Second, we increased by one week the gap between the filing of replies in support of dispositive motions and the deadline to meet and confer regarding the prehearing statement.

III. **Unresolved Issues Regarding OFCCP's Requests for Production of Documents**

In employment discrimination cases, courts apply more liberal discovery rules than in other cases since employers control the information. *See Finch v. Hercules, Inc.*, 149 F.R.D. 60, 62 (D. Del. 1993) ("[T]he necessity for liberal discovery to clarify the complex issues encountered in litigation seeking to redress employment discrimination has been widely recognized."). In addition, the Rule 26 proportionality factors support broad discovery of Oracle's documents and information. Oracle possesses virtually all the information relevant to the discrimination claims. *OFCCP v. JBS USA Holdings, Inc.*, 2015-OFC-1, Order Granting Motion to Compel, at 8-9 (Apr. 22, 2016)(where a plaintiff has very little discoverable information, and the other party has vast amounts of information, "the burden of responding to discovery lies heavier on the party who has more information, and properly so."), quoting Fed. R. Civ. P. Rule 26(b)(1), Advisory Committee's Note (2015). Furthermore, "[t]he issues at stake are great indeed. The present

litigation is founded upon Executive Order 11246, which was enacted for the express purpose of prohibiting ‘discriminat[ion] against any employee or applicant for employment because of race, color, religion, sex, or nation origin’ by Government contractors.” *JBS*, at 9. In addition, the monetary stakes⁶ are high, involving potentially hundreds of millions of dollars. And, Oracle’s vast resources also weigh in favor of disclosure.⁷

OFCCP requests that the Court compel Oracle to produce employee information and documents Oracle created to comply with OFCCP regulations.

A. RFP 83 – Employee Contact Information

OFCCP has requested employee contact information to enable it to speak to employees about their employment experiences, allowing the agency to collect additional anecdotal evidence that “is important to bring discrimination claims convincingly to life.” *Wellens v. Daiichi Sankyo Inc.*, 2014 WL 969692, at *3 (N.D. Cal. Mar. 5, 2014) (internal quotation marks omitted). To resolve Oracle’s objections, OFCCP limited its request for personal contact information to those current and former Oracle employees at the Redwood Shores facility in the PT1 job group and Product Development, Information Technology, and Support lines of business who fall within the scope of OFCCP’s discrimination claims (*i.e.*, females in the Product Development, IT, and Support lines of business; African Americans in the Product Development line of business; Asians in the Product Development line of business; and African Americans, Hispanics, and Whites who applied for positions in the PT1 job group but were unsuccessful). This request comports with the practice in private Title VII cases, in which requests for contact information are commonplace, with courts routinely compelling production of such information. *See, e.g., id.* at *4 (granting motion to compel).

Oracle has refused to produce the requested information, asserting privacy concerns. However, the Protective Order, which Oracle requested and to which it stipulated except for one provision, addresses these concerns by protecting information “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *See* Protective Order § 2.2 (citing 5 U.S.C. § 552(b)(6)). Moreover, the Department’s rules on handling such information affords additional protection. *See* DOL Guidance on the Protection of Personal Identifiable Info., <https://www.dol.gov/general/ppii>. Despite these protections, on July 28, Oracle proposed using for the first time a process entailing providing employees with prior notice of the potential disclosure and an opportunity to object. *Belair-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554, 556 (2007). But federal courts hold that this *Belair* state procedure, which would only delay production of the information,

⁶ While binding case law makes clear that the amount of federal contracts should not be weighed in considering whether information must be supplied to OFCCP, *see OFCCP v. Coldwell Banker*, 78-OFCCP-12, 1987 WL 774229, *7 (Sec’y Dec., Aug. 14, 1987) (“[T]he constitutionality of the applicability of the Executive Order does not turn on whether, as applied to a particular contractor, the contractor’s government derived revenues exceed costs associated with compliance. Cost alone does not make application of a law unconstitutional.”), to the extent this court finds the amount of Oracle’s contracts to be a relevant factor in weighing proportionality, Oracle stipulated that it “has been a covered federal contractor for over 20 years and the total amount of its government contracts has exceeded \$100 million each year since 2013.”

⁷ Oracle is one of the world’s largest providers of software for enterprises, with revenues of \$37 billion annually. (Oracle Form 10-K for the period ending March 31, 2014, p. 7, 9, Ex. 1 to Bremer Decl. in support of OFCCP’s Motion for a Ruling on the Temporal Scope of Discovery.)

unnecessary even in cases involving private plaintiffs not regulated by the same rules as the Department or where a protective order exists. *See, e.g., Wellens*, 2014 WL 969692, at *3 (noting privacy interests addressed by protective order) (citing cases); *Bell v. Delta Air Lines, Inc.*, 2014 WL 985829, at *4 (N.D. Cal. Mar. 7, 2014) (finding “standard protective order” addresses privacy concerns and holding “opt-out procedures [are] not necessary in this context”) (citations omitted).

Oracle also insists on limiting its production of contact information to 20 percent of the Product Development, Information Technology, and Support lines of business, citing ALJ Berlin’s decision in *OFCCP v. Google*, which applied an administrative subpoena analysis and did not consider specific charges of discrimination. As an initial matter, the Administrative Review Board has set a briefing schedule in that case and OFCCP anticipates taking exception to that portion of ALJ Berlin’s decision. However, even if the *Google* decision were to become a final order, it is distinguishable. ALJ Berlin held the request for contact information of all employees at Google’s Mountain View facility during the investigatory stage to be overbroad and to burden Google’s relationship with its employees. Recomm. Decision at 31-32, *OFCCP v. Google* (July 14, 2017).⁸ Here, OFCCP is requesting only the information of current and former employees who are within the class subject to OFCCP’s specific discrimination claims, implicating a far narrower employee population.⁹ Under such circumstances, courts have compelled production, notwithstanding objections over privacy. *See, e.g., Artis*, 276 F.R.D. at 352-53 (in Title VII case, over privacy objection, ordering disclosure of contact information of all proposed class members in light of protective order); *Wellens*, 2014 WL 969692, at *4 (same). Where the class of affected employees is defined, as it is here, there is no reason to limit production.

The requested employee contact information is undeniably relevant, and the privacy burden Oracle advances is addressed by the existing Protective Order. Courts routinely require the production of this information and Oracle should be directed to produce it.

B. Analyses and Documents Prepared pursuant to Regulations: RFPs 71, 72, 78, 79, 80, 87, and 88

Oracle refuses to produce documents regarding internal audits of its employment practices it was required to conduct by OFCCP regulations. The relevant RFPs are attached.

Oracle must conduct in-depth analyses of its employment process, including its applicant flow to determine whether there are selection disparities, compensation systems to determine if there are gender, race or ethnicity-based disparities, selection, recruitment, or referral procedures that result in disparities. 41 C.F.R. § 60-2.17. It must also develop programs to correct any problems identified. *Id.* In addition, 41 C.F.R. part 60-3 also requires validation of selection procedures used to make hiring decisions, including hiring. OFCCP requested analyses Oracle conducted and documents it prepared in compliance with these regulations.

⁸ Judge Berlin’s decision was undergirded by his concern that because there was no specific charge of discrimination at the time of the compliance review, “[t]he result is an investigation in which a vast amount of information could be relevant.” *Id.* at 25. Here, OFCCP has filed a complaint with specific allegations of discrimination.

⁹ For example, the compensation data Oracle provided for 2014 shows less than 1,500 females in the Product Development, Support, and Information Technology lines of business at Redwood Shores. Also, during the compliance review period, only approximately 120 hires were non-Asian.

Oracle's analyses of its employment practices are highly relevant to the issue of whether its practices are discriminatory. They are also relevant to OFCCP's claim that Oracle failed to undertake such required analyses.¹⁰ In *OFCCP v. JBS USA Holdings*, No. 2015-OFC-1 (OALJ Nov. 25, 2016), after OFCCP moved to compel production of adverse impact analyses and audits relating to hiring and selection of applicants, the contractor agreed to produce the selection analyses, and the OALJ ordered the production of the internal audits. The contractor failed to establish that any privilege applied, so the OALJ ordered the reports produced. *Id.* at 7.

Here, Oracle only secondarily relies on privilege objections. Oracle has made no effort to establish that responsive documents are privileged, and therefore, cannot meet its burden of establishing these privileges. See *Banneker Ventures LLC v. Graham*, 2017 WL 2124388, at *3 (D.D.C. May 16, 2017) (party claiming work product privilege has burden of providing that the document was prepared because of the prospect of litigation). Moreover, any such attempt would fail, since courts have repeatedly held that a party cannot claim privilege for documents required by regulation. See, e.g., *United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011) (work product doctrine did not apply to appraisal documents Richey created to comply with the law); *Nat'l Union Fire Ins. v. Murray Sheet Metal*, 967 F.2d 980, 984 (4th Cir. 1992) (materials prepared "pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3); *Banneker Ventures*, 2017 WL 2124388, at *5 (attorney-client privilege does not protect disclosure of underlying facts); *Jewell v. Polar Tankers Inc.*, 2010 WL 1460165, *2 (N.D. Cal. 2010) ("[T]he mere submission of a report to an attorney for review does not render the communication privileged.") (internal citation omitted). In light of these well-settled principles, Oracle's privilege objections do not prevent disclosure of: 1) the analyses Oracle conducted pursuant to regulations, 2) the data it relied upon, or 3) the actions taken in response to the analyses.

Oracle primarily objects to producing documents prepared in compliance with the regulations on the novel theory that "by referring to a regulation, requires Oracle to read, research, and apply the regulation to the request, which inherently requires a legal analysis of the regulation and its applicability," and the requests "require[] Oracle to refer to materials outside the request itself." (Oracle's Am. & Supp. Resps. & Objs. to 2d Set of RFPs.) Oracle provides no authority supporting this argument, other than a strained reference to Fed. R. Civ. P. 34.¹¹ Contrary to Oracle's argument, these RFPs do not require Oracle to conduct new research, or interpret the regulations. Nor is OFCCP asking Oracle to now conduct an evaluation or an in depth analysis. Instead, Oracle must produce any documents it previously created pursuant to the regulations.

¹⁰ The Amended Complaint alleges, "Oracle also refused to produce to the agency any material demonstrating whether or not it had performed an in-depth review of its compensation practices, the findings of any such review, and the reporting and corrective actions proposed as a result of such review, all of which is required by 41 C.F.R. § 60-2.17(b)-(d). Moreover, Oracle failed to provide any evidence that it conducted an adverse impact analyses required by 41 C.F.R. §§ 60-3.15A and 60-3.4." Amended Complaint, ¶ 13.

¹¹ Oracle claims "[i]n light of the legal analysis required by the requests' reference to regulations, OFCCP's requests fail to describe the records it seeks with reasonable particularity, but instead requires Oracle to refer to external materials and conduct the above-described research and analysis; that does not comport with Rule 34." (June 9, 2017 Letter from J.R. Riddell to Norman Garcia.)

With respect to the validity studies requested in RFPs 87 and 88, Oracle objects on the additional ground that OFCCP did not state the specific tests or selection procedures upon which Oracle would have conducted validity studies. During the compliance review, Oracle did not provide data on the disposition of applicants at each step of the hiring process, and accordingly, OFCCP's statistical analysis was necessarily limited to the disparities between Asians and non-Asians through the hiring process as a whole. In its complaint, OFCCP alleged discrimination, notifying Oracle of the job groups impacted and the protected classes. OFCCP was not required, nor did it, limit the case to a particular theory of discrimination or identify the particular practices allegedly causing the disparities. Nevertheless, Oracle regurgitates the argument that the Court rejected in its Motion for Judgment on the Pleadings—that this action is confined to the limits of the information disclosed during the compliance review. Just as Oracle's disclosure of information to a limited time period during the compliance review does not limit this enforcement action to that period, Oracle's disclosure of information about the overall hiring and compensation process during the review does not preclude OFCCP from obtaining information about the specific components or steps of its hiring and compensation processes. If Oracle conducted analyses of its hiring or compensation processes, these would be highly relevant to the discrimination allegations, and should be produced.

IV. Unresolved Issues Regarding Oracle's Discovery Requests

Although OFCCP agreed to produce all non-privileged, relevant, and non-public documents in the Pacific Region, Oracle continues to demand OFCCP produce privileged information, and contention discovery that is premature.

A. Depositions

The parties have conferred extensively about Oracle's request for a Rule 30(b)(6) deposition of OFCCP. Oracle seeks to depose OFCCP on nine topics concerning the basis for OFCCP's allegations. OFCCP will produce a witness to address Topic 7 of the deposition notice.¹² A deposition on the remaining eight topics is simply not proportional to the needs of the case at this point in litigation. Oracle will have the opportunity to fully explore OFCCP's factual bases for OFCCP's allegations through examining OFCCP's expert witness(es) and OFCCP fact witnesses, such as Oracle's former employees.

Oracle explained that the deposition is not intended (1) to explore the compliance review or (2) to test the sufficiency of the Amended Complaint.¹³ Rather, Oracle seeks to discover the facts

¹² "The records, materials and evidence that Oracle failed or refused to produce ... including: ... the records ... sought by OFCCP; ... the date(s) that OFCCP requested the records ...; ... the date(s) of ORACLE's refusal; ... ORACLE's reasons, if any, for refusing to produce or provide the records...."

¹³ In any event, Oracle would not be entitled to discovery if it contended that OFCCP had no basis in fact or law to bring this action. See *Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991); see also *Vasudevan Software, Inc. v. Int'l Bus. Machines Corp.*, 2011 WL 940263, at *5 (N.D. Cal. 2011) (unreported) (collecting cases); Advisory Committee Notes 1983 Amendment, Fed. R. Civ. P. 11. Similarly, a challenge to the Amended Complaint for a failure to state a claim

supporting OFCCP's discrimination allegations in a manner very similar to contention interrogatories. Deposing OFCCP regarding the facts it currently possesses would not advance this case. OFCCP will prove its discrimination allegations using data, evidence, and testimony derived from discovery. It expects to rely heavily on outside expert analyses of the new data Oracle is preparing as well as other evidence obtained through discovery. At this point, Oracle has not provided critical information related to its employment practices, preventing OFCCP from fully developing the facts to support its allegations. OFCCP could only discuss its pre-complaint investigation, which it detailed in the NOV issued to Oracle. Also, to protect its deliberative and investigative processes, as well as confidential informants' identities, OFCCP cannot offer much more than what it has already disclosed.

Since the parties agree that there is no reason to explore the compliance review, and Oracle does not seek to examine the Amended Complaint's sufficiency, deposing OFCCP at this point would only waste the parties' resources. *See In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 337–38 (N.D. Cal. 1985) (“in cases where defendants presumably have access to most of the evidence about their own behavior, it is not at all clear that forcing plaintiffs to answer [questions seeking all bases for a contention in a pleading], early in the pretrial period, is sufficiently likely to be productive to justify the burden that responding can entail”); *see also McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 286 (N.D. Cal.), *rev'd in unrelated part*, 765 F. Supp. 611 (N.D. Cal. 1991) (in complex cases, “no one human being can be expected to set forth, especially orally in deposition, a fully reliable and sufficiently complete account of all the bases for the contentions made and positions taken” by large, sophisticated organizations).

B. Written Discovery

Similarly, Oracle continues to demand written discovery that is privileged, as well as irrelevant and premature contention discovery regarding the bases of OFCCP's allegations.

*1. OFCCP's statistical analyses and their supporting data are not relevant and both are privileged.*¹⁴

Oracle demands documents disclosing OFCCP's internal discussions and preliminary discussions about this case, such as OFCCP's preliminary analysis of data provided during the desk audit phase of the review. These materials are protected by OFCCP's deliberative process and investigative files privileges. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (holding deliberative process privilege to protect OFCCP expert's analysis and recommendations); *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571, 580 (9th Cir. 1980) (noting investigative files privilege “applies to informal investigatory material and *preliminary determinations*”) (emphasis added). Courts have

would be untimely, and a motion for summary judgment based on a similar theory would be premature. Fed. R. Civ. P. 12, 56(d).

¹⁴ OFCCP makes a distinction between the underlying facts such as those in the 2014 compensation snapshot and the data sets pulled from the facts used in the statistical analysis. The underlying facts are producible while the data sets are not relevant and are protected by the deliberate process privilege. *E.E.O.C. v. FAPS, Inc.*, 2012 WL 1656738, at *31 (D. N.J. May 10, 2012).

repeatedly held that statistical analysis considered by the government in deciding whether to file a complaint are protected by this privilege. *E.E.O.C. v. FAPS, Inc.*, 2012 WL 1656738, at *31 (D. N.J. 2012) (the data, statistical analyses and their reports gathered and analyzed by EEOC as part of its decision regarding whether to charge employers met the two requirements of this privilege – they were both “pre-decisional” and “deliberative in nature”). OFCCP’s statistical analyses were likewise pre-decisional and deliberative and protected from disclosure.

Separate from being protected, such material has no bearing on the central issue in this case: whether Oracle engaged in unlawful discrimination with respect to recruiting, hiring and compensation. OFCCP’s prior statistical analyses are simply not relevant to this case because they will not be used to prove Oracle’s discrimination violations. Oracle will be producing data that will be much more comprehensive in terms of the time period covered, and the information included. Statistical analyses of this data will provide the basis for the statistical analyses to be used to establish the discrimination claims. The less comprehensive data and OFCCP’s analysis of it during the compliance review is simply no longer in play.

Similarly irrelevant, are Oracle’s continuing demands for the factual bases of OFCCP’s allegations in the complaint, since OFCCP’s proof at the hearing will be based primarily on data and other documents Oracle has not yet produced. In any event, in good faith, OFCCP responded fully to Oracle’s interrogatories on these issues, explaining the various bases the agency had for its discrimination allegations, much of which the agency had already disclosed in the March 2016 Notice of Violation (“NOV”). Further disclosure is disproportionate to the needs of the case.

2. OFCCP is not required to provide a privilege affidavit at the time it makes a governmental privileged objection

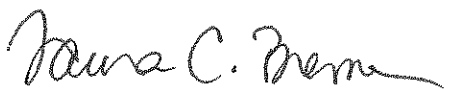
Oracle claims OFCCP waived government privilege by failing to provide an affidavit invoking the privileges from the head of the agency at the time it made its objections. However, a privilege affidavit is not required at that time. In fact, OFCCP can provide a privilege affidavit *to the court* when those privileges are challenged in a motion to compel. See *Perez v. El Tequila, LLC*, 2014 WL 5341766, at *4 (N.D. Okla. 2014) (slip copy) (finding privilege properly invoked where DOL filed an affidavit in response to a motion to compel); cf. *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975) *aff’d*, 426 U.S. 394 (1976) (finding error where no formal invocation of a government privilege was made “in the district court”); *U.S. v. Russell*, 345 U.S. 1, 11 (1953) (finding document protected under governmental privilege when Air Force Agency head claimed privilege through an affidavit filed after the district court had preliminarily ruled).

Against this weight of authority, Oracle’s cites to dicta that misconstrues the *Kerr* holding, and various cases that do not trump Ninth Circuit and Supreme Court precedent. Comments regarding the timing of a privilege affidavit in *Miller v. Pancucci*, 141 F.R.D. 292 (C.D Cal. 1992) are dicta, because the court did not rule on the privilege issue. *Id.* at 301. The *Miller* court also misconstrues the *Kerr* holding, because the *Kerr* court never stated that an affidavit was required at the time of the discovery responses. *Kerr*, 511 F.2d at 198 (affidavit was never provided by the agency in district court).

Significantly, Oracle provides no legal authority for its position that OFCCP's invocation of governmental privileges is waived if OFCCP produces an affidavit from the agency head in response to a motion to compel. To the extent that Oracle assails governmental privileges in motion practice, OFCCP will produce an affidavit from the agency head at that time. *See, Perez v. Brain*, No. 14-cv-03911-JAK-AGR, Order re Discovery Mot. at 4, n.6 (C.D. Cal. July 21, 2015) (ECF No. 183) (finding no waiver where affidavit was served after meeting and conferring regarding discovery request).

We look forward to discussing these issues with you next week.

Respectfully,

By: 
LAURA C. BREMER
Senior Trial Attorney

Analyses and Documents Prepared pursuant to Regulations: RFPs 71, 72, 78, 79, 80, 87, and 88

RFP 71: "YOUR internal pay equity analyses conducted pursuant to 41 C.F.R. § 60-2.17 for the RELEVANT TIME PERIOD, including the date of the analysis and dataset(s) used for the analysis."

RFP 72: "All DOCUMENTS RELATING TO actions taken during the RELEVANT TIME PERIOD in response to YOUR internal pay analyses conducted pursuant to 41 C.F.R. § 60-2.17."

RFP 80: "In-depth analyses of the total employment process, as required in 41 C.F.R. § 60-2.17(b), for positions in the PT1 job group or Product Development, Information Technology, and/or Support lines of business for the RELEVANT TIME PERIOD."

RFP 78: "ADVERSE IMPACT ANALYSES, as required by 41 C.F.R. § 60-3.15A, performed by YOU or any other PERSONS acting or purporting to act on YOUR behalf or at YOUR direction for the RELEVANT TIME PERIOD."

RFP 79: "Evaluations of each step or component of the selection (i.e., HIRING) process, as described in 41 C.F.R. § 60-3.4(C), for positions in the PT1 job group and/or Product Development line of business for the RELEVANT TIME PERIOD."

RFP 87: All DOCUMENTS RELATING TO validity studies or evaluations that YOU or someone on YOUR behalf conducted RELATING TO any step or component of the HIRING process for employees in the PT1 job group and Product Development line of business during the RELEVANT TIME PERIOD.

RFP 88: All DOCUMENTS RELATING TO validity studies or evaluations that YOU or someone on YOUR behalf conducted RELATING TO any step or component of the COMPENSATION determination process for employees in the Product Development, Information Technology, and Support lines of business during the RELEVANT TIME PERIOD.